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Supreme Court of the United States

OCTOBER TERM, 1949

No. 604

TEX-O-KAN FLOUR MILLS COMPANY, D/B/A
PERRY BURRUS ELEVATORS,
Petitioner,

Versus

TEXAS AND PACIFIC RAILWAY COMPANY,
Respondent.

AMICUS CURIAE BRIEF ON BEHALF OF THE BOARD OF TRUSTEES OF THE GALVESTON WHARVES AND GALVESTON CHAMBER OF COMMERCE

By BRYAN F. WILLIAMS,
Their Attorney.

Date: February 22, 1950.

Address: 511 United States National
Bank Building,
Galveston, Texas.

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To the Honorable Chief Justice and Associate Justices of the Supreme Court:

Come now the Board of Trustees of the Galveston Wharves and Galveston Chamber of Commerce and, with written consent of all parties hereto, file this amicus curiae brief in the above cause.

DESCRIPTION OF AMICUS CURIAE

The Board of Trustees of the Galveston Wharves is a five-member board which, as an agency of the City of Galveston, Texas, a municipal corporation of the State of Texas, manages and operates city-owned terminal facilities in that city which comprise a terminal railroad, wharves, docks and other facili-

ties, including a large grain elevator, used in exporting grain and other commodities through the Port of Galveston. For convenience that Board of Trustees is below called "Galveston Wharves."

The Galveston Chamber of Commerce is a non-profit corporation organized and existing under the laws of the State of Texas with its principal office and place of business at Galveston, Texas. It was organized, and is maintained, by the commercial and business interests of the City of Galveston, Texas, for the protection and advancement of the commercial interests of that city, including the development of import and export traffic through the Port of Galveston.

These amicus curiae have no interest in the private law suit here involved but they are greatly interested in the effect the decision herein will have on freight tariffs published pursuant to orders of the Interstate Commerce Commission equalizing the rates on export traffic moving through the ports of Houston, Galveston and Texas City. This brief is devoted to that one matter.

POINT ONE

Decisions and orders of the Interstate Commerce Commission found to be necessary in order to permit grain and other commodities to move for export through the Port of Galveston should not be nullified by an incorrect interpretation of a freight tariff published in compliance with those orders.

(a) Necessity for Equalization

Grain is a very important commodity to the Port of Galves-

ton. In *Grain and Grain Products in the Western District and for Export,* 164 I.C.C. 619, 700, the Interstate Commerce Commission stated that the annual surplus of grain grown in the United States prior to 1930 amounted to 200,000,000 bushels or 12,000,000,000 lbs., which must be disposed of in foreign markets. The Court may take judicial notice of the fact that the amount of grain produced in the United States has greatly increased since 1930. *Commissioner Meyer,* the Commissioner in charge of that case, pointed out at page 701 of the decision that equalization of charges through the various ports is one of the important factors in exporting that grain surplus.

In *Rate Structure Investigation, Part 3, Cotton,* 165 I.C.C. 595, 660, decided in 1930, the Commission stated that the ports of Galveston, Houston and Texas City were then equalized on export cotton, saying at page 660:

> "We are of opinion that Houston, Galveston, and Texas City should be considered as one terminal district or port and that for the longer hauls the cotton rates to those points should be the same. The physical situation is such, however, that the distance to none of the three points can be taken as representative of the district as a whole and it would not be proper, therefore, to require the application of a distance rate to any one of the points to all of them. We will therefore give consideration to the distances to all the points in making the rates."

At page 666, the Commission specifically prescribed groups for the purpose of equalizing the charges on cotton to all three of said ports.

In the *Consolidated Southwestern Cases*, 205 I.C.C. 601, 636, the Commission reaffirmed its finding in *Rate Structure Investigation, Part 3, Cotton*, supra, as to Galveston, Houston and Texas City constituting one terminal district or port, and held that the rates or charges should be based on the short line distance to Houston, plus 15 miles. At pages 636-637, it said:

> "So far as these three cities are concerned the bulk of the traffic moves to or from Houston. Because neither Houston nor either of the two other cities is geographically or in volume of traffic representative of this terminal district, no one of them can properly be taken as the rate-basing point without modification. In view of this situation, we conclude that the group rates may be arrived at by adding 15 miles to the short-line distance between Houston and any given point."

In *Port Commission of Beaumont v. Abilene & Southern Railway*, 251 I.C.C. 137, 166, and *Nueces County Nav. District No. 1 v. Abilene & S. Ry. Co.*, 251 I.C.C. 115, 134, the Commission again reaffirmed its previous formula for grouping Galveston with Houston.

The Interstate Commerce Commission for many years has recognized that Houston, Galveston and Texas City should be considered as one terminal district or port, and should be grouped for the purpose of assessing rates and charges on export traffic. Galveston can not hope to draw export grain and other commodities through the port of Galveston unless they can be transported to Galveston at a charge which does not exceed the charge assessed to the Port of Houston. Under the Circuit Court's opinion, the extra charges through Galves-

ton on the 71 cars involved in this cause would amount to $1,263.63, an average of $17.80 per car. Such average penalty of $17.80 per car will destroy the equalization of charges through the three ports which the Commission has found to be necessary and will destroy all opportunity on the part of Galveston to compete with Houston on shipments of grain of the character involved in this case.

(b) Circuit Court Improperly Construed Tariff

Following the decisions and orders of the Interstate Commerce Commission in Dockets 28235 and 28259, *Port Commission of Beaumont v. Abilene and Southern Ry.*, 251 I.C.C. 137, and *Nueces County Navigation District v. Abilene & Southern Ry.*, 251 I.C.C. 115, The Texas and Pacific Railway and all other Texas railroads attempted to comply with the Commission orders by publishing in Texas Lines Tariff 61-D, Item 105-A, which reads as follows:

> "(a) Where the rate-making distance from or to Houston, Texas, is 150 miles or more, the rates from or to Houston, Galveston and Texas City, Texas, when applied on export, import, intercoastal and coastwise traffic will be determined by using the distance from or to Houston, Texas, plus 15 miles." (R. 39.)

The trial court held that the foregoing item does not apply to the "extra service charge" authorized in Item 980-E set forth on page 36 of the record because Item 105-A uses the word "rate" and does not specifically include the words "extra service charges." (R. 57.) The Circuit Court affirmed that construction.

The term "rate" has long been used by the Interstate Com-

merce Commission to include all charges for the carriage of freight. It refers to the compensation to be paid to the carrier, regardless of the term by which that compensation is designated in the tariff. (See page 2 of Petition for Writ of Certiorari.)

If Item 105-A is construed to apply only to tariff charges specifically designated as "rates" in the tariff, it will not comply with either the letter or the spirit of the Commission's decisions and orders in Dockets 28235 and 28259, hereinbefore cited. The equalization found by the Commission to be necessary can not be attained through that construction of the item.

Galveston Wharves and the Galveston Chamber of Commerce have spent many years developing a rate adjustment which will enable Galveston and Texas City to participate in handling export and import traffic on a basis competitive with Houston, approximately 50 miles farther inland than Galveston. The decision of the Circuit Court, Fifth Circuit, if not reversed, will deprive these organizations of a portion of that adjustment.

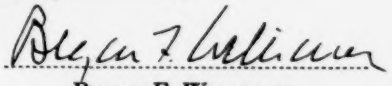
As construed by the Circuit Court, Item 105-A will be unlawful because it does not comply with the Commission's orders in Dockets 28235 and 28259. The word "rates" used in said Item should be construed to cover all charges for the carriage of freight, regardless of the term by which they may be designated in the tariff. That is the manner in which the word "rates" is used in the Interstate Commerce Act and by the Interstate Commerce Commission. When so construed, the Item will conform with the orders of the Interstate Commerce

Commission and will continue the equalization under which Galveston has handled export traffic for many years.

PRAYER

The Board of Trustees of the Galveston Wharves and the Galveston Chamber of Commerce respectfully pray that a Writ of Certiorari be issued as prayed for by petitioner and that the decree of the Circuit Court be reversed and that Item 105-A be construed as applying to all provisions of Item 980-E, Texas Lines Tariff 61-D.

Respectfully submitted,



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The Board of Trustees of the
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Date: February 22, 1950.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day mailed a copy of this petition to Messrs. Robertson, Jackson, Payne, Lancaster and Walker, the attorneys for the respondent, at their offices in the Republic Bank Building in the City of Dallas, Texas, and to Messrs. Ralph W. Currie and Frank A. Leffingwell, the attorneys for the Tex-O-Kan Flour Mills Company, at their offices in the Praetorian Building, Dallas, Texas.

Witness my hand this the 24 day of February, 1950.

Byron F. Williams

Of Counsel